

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

The UNITED STATES of America)
 for the Use and Benefit of)
 Graybar Electric Company,)
 Inc., a New York Corporation,)
 and GRAYBAR ELECTRIC COMPANY,)
 INC., Individually,)
 Plaintiffs,)

NO. CV-05-0068-LRS

ORDER GRANTING IN PART,
 DENYING IN PART DEFENDANT
 OVERSTREET'S MOTION FOR
 PARTIAL SUMMARY JUDGMENT

-vs-

OVERSTREET ELECTRIC CO., INC.,)
 a Florida Corporation and)
 ATLANTIC MUTUAL INSURANCE)
 COMPANY, a New York)
 Corporation,)
 Defendants.)

Before the Court is Defendant Overstreet Electric Company's [Overstreet] Motion for Partial Summary Judgment (Ct. Rec. 99), filed March 13, 2006; and Defendant Overstreet's Motion to Strike (Ct. Rec. 126), filed April 14, 2006. A hearing was held on May 9, 2006 in Yakima, Washington. Ryan Harkins and James Yand participated on behalf of Defendant Overstreet. Jeremy Larson participated on behalf of Plaintiff Graybar Electric Company [Graybar]. The Court has considered the oral and written arguments of counsel, and now enters this order to memorialize and supplement the oral rulings of the Court, which are incorporated herewith by reference.

1 **I. Background and Summary of Facts**

2 At the time of this dispute, Overstreet and Graybar had been
3 doing business together for at least eight years, as evidenced by
4 a credit agreement the parties entered into on October 31, 1994.
5 On July 7, 2002, Overstreet and the U.S. Army Corps of Engineers
6 ("Corps") entered into an agreement for installation of a station
7 service transformer for the Chief Joseph Dam Project for the
8 United States Government Contract No. DACW67-020C-0012 ("Corps
9 Contract"). The Corps Contract was a Miller Act contract.

10 On July 16, 2002, Overstreet issued Purchase Order 402-241860
11 to Graybar for the provision of specially manufactured materials
12 and equipment for installation of a station service transformer
13 for the Corps Contract pursuant to the terms referenced on the
14 Purchase Order. The Purchase Order called for payment of the sum
15 of \$370,800. Butch Bernard, Overstreet's Purchasing Manager at
16 the time, signed the P.O. on July 16, 2002. Stephen Tisdale,
17 Graybar's Pensacola Branch Manager at the time, never signed the
18 P.O. during the July 16, 2002 negotiations for the P.O. The
19 undisputed evidence indicates that Mr. Tisdale had apparent
20 (actual authority is in dispute) authority to negotiate a binding
21 arrangement with Overstreet and had in fact "negotiated
22 approximately seventy (70) major purchase- order contracts with
23 Benjamin Overstreet." Tisdale Decl., ¶2.

24 The undisputed evidence indicates that it was not uncommon,
25 over the long course of Graybar's and Overstreet's business
26 dealings, for Overstreet to order goods from Graybar under
27 Overstreet purchase orders that were not signed by Graybar. Mr.
28 Jones stated in his declaration that Overstreet routinely did not

1 seek acceptance of the purchase orders by signatures of Mr.
2 Tisdale or any other authorized agent of Graybar. Jones
3 Declaration, ¶16.

4 On July 25, 2002 Graybar created an internal document titled
5 "Approval Form" which purportedly is an internal quality control
6 device used to insure qualifying purchase orders meet certain
7 Graybar standards. Karrenbauer Decl. The Approval Form was never
8 sent to Overstreet to communicate Graybar's acceptance of the
9 terms and conditions. Karrenbauer Decl.

10 Overstreet states that it was their intention that the
11 requirements of the Corps Contract would be incorporated into the
12 P.O. In support of this assertion, Overstreet references
13 paragraphs 3, 4 and 6 of the P.O. as well as the express reference
14 to Contract No. DAC67-02-C-0012,¹ the Corps Contract, on the first
15 page of the P.O.

16 Paragraph 3 reads, in pertinent part:

17 This purchase order agreement shall comply with
18 the contract documents, plans, specifications
and amendments where applicable.² . . .

19 Paragraph 4 reads, in pertinent part:

20 . . . All submittals shall be complete and in
21 compliance with the contract submittal
requirements.

22 ///

24 ¹The Court notes that the Corps Contract referenced in the
25 P.O. is Contract No. DAC67-02-C-0012 which omits the "W" from the
26 contact number appearing on Corps' documentation (Contract No.
DACW67-020C-0012).

27 ²Use of the term "applicable" may suggest that only
28 applicable provisions from the Corps Contract were technically
incorporated into the P.O. Overstreet concedes that for purposes
of its motion, it is concerned with incorporation of the
completion date only.

1 Paragraph 6 reads, in pertinent part:

2 . . . Submittals shall be complete and shall
3 include all submittal requirements required by
4 the specifications consisting of catalog data,
shop drawings, certificates of compliance, O&M
Manuals, etc. where required. . . .

5 Overstreet further argues that the Corps Contract initially
6 contained a "legal completion date" of June 30, 2003, which date
7 was later revised to July 13, 2003. In support of Overstreet's
8 argument that the completion date of the Corps Contract was
9 incorporated into the P.O., Overstreet refers the Court to
10 paragraphs 3, 13, and 15 of the P.O.

11 Paragraph 13 reads:

12 Time is of the essence, please procure submittal
13 data, production and of all materials/equipment
14 in such a manner so as not to delay the progress
of the completion of this project.

15 Paragraph 15 sets forth a delivery date, other than the completion
16 date found in the Corps Contract, of February 27, 2003.

17 Graybar asserts, on the other hand, that the P.O. lacked any
18 specific "incorporation-by-reference" language whereby the entire
19 Corps Contract was incorporated. Graybar further argues that the
20 P.O. itself does not mention the completion date, and therefore
21 was not binding on Graybar. Even if the date was somehow
22 incorporated, Graybar concludes that it had no control over the
23 start dates of its performance due to the operation of ¶6 of the
24 P.O. See Jones Decl.

25 Paragraph 6 reads, in pertinent part:

26 Unless otherwise stipulated, this purchase order
27 is on hold for release, pending submittal
28 approval and written release from Overstreet
Electric Co., Inc. All materials/equipment is
subject to the approval of the
architect/engineer/owner.

1 Graybar did not deliver the materials until September 5, 2003
2 which Overstreet argues was in breach of the P.O. which required
3 delivery in time to permit completion of the Corps Contract legal
4 completion date of July 13, 2003. Graybar contends that the P.O.
5 contract did not contain a term for the completion date and any
6 delays were caused by Overstreet and the Corps.

7 There is some dispute concerning the date that the Corps
8 Contract with Overstreet was closed. Graybar suggests that the
9 Corps terminated its contract with Overstreet on November 12,
10 2003. Jones Decl. Overstreet suggests, through the Morgan
11 Overstreet Declaration, that the Corps Contract was closed by
12 February 6, 2004. Atlantic suggests, through the Scalf
13 Declaration, that the Corps Contract was closed on March 1, 2004.
14 In any event, in December 2003 Graybar advised Overstreet of its
15 project close out costs and then billed Overstreet in March 2004.
16 Graybar claims Overstreet owes \$313,036.37 for the specially
17 manufactured equipment (Trench air core dry reactor) and materials
18 Graybar supplied to Overstreet. The Corps is presently in
19 possession of the Trench air core dry reactor.

20 On March 4, 2005, Graybar filed suit in this court against
21 Overstreet's bonding company Atlantic Mutual Insurance Company
22 ("Atlantic") for \$313,036.37 for its performance under the P.O.
23 Graybar asserted a breach of contract claim under Washington state
24 and common law against Overstreet and also requested attorney's
25 fees for its breach of contract claim pursuant to section 9 of the
26 P.O. Overstreet has asserted counterclaims against Graybar for
27 breach of the P.O. because Graybar failed to timely deliver
28 materials and equipment in compliance with the Corps Contract.

1 Graybar now argues, in opposition to Overstreet's motion for
2 partial summary judgment, that the P.O. is not an enforceable
3 contract except as to Graybar's interest as a seller.

4 **II. Summary Judgment Standard**

5 A Court will grant summary judgment where the documentary
6 evidence produced by the parties permits only one conclusion.
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The
8 party seeking summary judgment must show that no genuine issue of
9 material fact exists and that the Court should grant judgment as a
10 matter of law. *Celotex Corp. V. Catrett*, 477 U.S. 317, 323
11 (1986). "A material issue of fact is one that affects the outcome
12 of the litigation and requires a trial to resolve the parties'
13 differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677
14 F.2d 1301, 1306 (9th Cir. 1982). The Court must construe all
15 facts and all justifiable inferences in favor of the non-moving
16 party. *Anderson*, 477 U.S. at 255.

17 The party opposing summary judgment must go beyond the
18 pleadings to designate specific facts establishing a genuine issue
19 for trial. *Celotex*, 477 U.S. at 324; *Marks v. United States*, 578
20 F.2d 261, 263 (9th Cir. 1978). The non-moving party may use
21 affidavits, depositions, answers to interrogatories, and
22 admissions to do this. *Celotex*, 477 U.S. at 323-24. The court
23 must enter summary judgment against a party who fails to make a
24 showing sufficient to establish an essential element of a claim,
25 even if genuine factual disputes exist regarding other elements of
26 the claim. *Id.* At 322-23. No issue for trial exists unless
27 sufficient evidence favors the non-moving party for a jury to
28 return a verdict for that party. *Anderson*, 477 U.S. at 249.

1 Thus, a scintilla of evidence in support of the non-moving party's
2 position will not suffice. *Id.* at 252.

3 At the summary judgment stage the Court's function is not to
4 weigh the evidence, judge credibility, or in any way determine
5 whether there is a genuine issue for trial. *Id.* at 249.
6 Essentially the inquiry is "whether the evidence presents a
7 sufficient disagreement to require submission to [a fact finder]
8 or whether it is so one sided that one party must prevail as a
9 matter of law." *Id.* at 252.

10 **III. Discussion**

11 Overstreet's motion for partial summary judgment covers the
12 following three issues:

13 A) Whether the P.O. is an enforceable contract between
14 Overstreet and Graybar;

15 B) Whether the P.O. incorporates by reference the requirements
16 contained in the Corps Contract; and

17 C) Whether Graybar breached the P.O. by failing to deliver
18 materials and equipment required by the P.O. until after the Corps
19 Contract's legal completion date of July 13, 2003.

20 The essence of Graybar's opposition is that the P.O. is not an
21 enforceable bilateral contract under Florida law³ because Graybar
22 never signed the P.O. Graybar argues that the P.O. is instead,
23 an enforceable unilateral contract and should be analyzed under
24

25
26 ³Although the purchase order between Overstreet, a Florida
27 company, and Graybar, a New York company, did not contain a choice
28 of law provision, this Court does not have to decide the choice of
law, as Florida, New York, and Washington have adopted the U.C.C.,
including U.C.C. § 2-201, and therefore, application of the law of
Florida, New York or Washington would produce substantially the
same outcome.

1 the Uniform Commercial Code ("UCC") and Statute of Frauds⁴, which
2 requires a writing for goods over \$500.00, signed by both parties.
3 Graybar asserts that because the P.O. was signed only by
4 Overstreet, Overstreet cannot enforce the P.O. against Graybar.
5 Graybar contends however, that it can enforce the P.O. against the
6 signing party Overstreet up to the price of the goods stated
7 therein or, \$313,036.37.

8 Overstreet contends that the P.O. is an enforceable bilateral
9 contract based on Graybar's performance, i.e. provision of the
10 specially manufactured goods and past business dealings between
11 the parties. Overstreet further argues that Graybar is judicially
12 estopped from now taking a position inconsistent with its position
13 in opposition to Atlantic's summary judgment motion, heard on
14 September 29, 2005--that there was an enforceable contract between
15 Overstreet and Graybar which specifically incorporated provisions
16 of the Corps Contract. Overstreet references Ct. Recs. 52, 130,
17 18, 123, 118, 121 and the September 29, 2005 "Verbatim Report of
18 Proceedings Summary Judgment" transcript to illustrate Graybar's
19 arguments in opposition to Atlantic's summary judgment motion
20 tending to show it believed an enforceable contract existed and
21 that Graybar was bound to perform under.

22 The Court finds Overstreet's argument convincing regarding
23 application of the judicial estoppel concept to Graybar's
24

25 ⁴Although neither party makes much of the specially
26 manufactured nature of the goods, the Court notes in passing that
27 the Statute of Frauds "exempts contracts involving "specially
28 manufactured" goods from the writing requirement because in these
cases the very nature of the goods serves as a reliable indication
that a contract was indeed formed." *Impossible Electronic
Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d
1026, 1036-37 (5th Cir.1992).

1 positions throughout this case. Judicial estoppel is invoked to:

2 Prevent a party from gaining an advantage by
3 taking inconsistent positions but also because
4 of general considerations of the orderly
5 administration of justice and regard for the
6 dignity of judicial proceedings, and to protect
7 against a litigant playing fast and loose with
8 the courts.

9 *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th
10 Cir. 2001). The Ninth Circuit has held that judicial estoppel
11 applies where a party asserts inconsistent positions and the court
12 relied upon or accepted the party's previous position. *Id.* at
13 782-3. This is the case here as the Court relied, in part, on
14 Graybar's assertions in denying Atlantic's summary judgment motion
15 and allowed Graybar to file supplemental pleadings to show it had
16 provided materials to the Chief Joseph Dam Project on March 18,
17 2005 pursuant to its "contract with Overstreet."

18 For instance, Graybar had argued in an effort to defeat
19 Atlantic's summary judgment on September 29, 2005 that
20 Specification Section 01701 of the Government Contract was
21 incorporated into the P.O. This provision required Graybar to
22 provide O&M manuals that Overstreet would in turn submit to the
23 Corps. Graybar cannot have it both ways. In another example,
24 Graybar states in its reply to Overstreet's counterclaim:

25 Plaintiff admits so much of Paragraph 3.2 that
26 states that Overstreet and Plaintiff entered
27 into a contract in 2002 identified as Purchase
28 Order 402-241860 whereby Plaintiff agreed to
supply and did supply materials and equipment to
Overstreet on credit in exchange for
Overstreet's promise to pay Plaintiff the sum of
\$370,800.00.

Ct. Rec. 18, paragraph 2.

In an effort to determine whether the P.O. was an enforceable
bilateral contract and to examine the customary definition of a

1 contract in the setting at hand, the Court looks, in part, to
2 Federal Acquisition Regulation ("FAR") 2.101, since the language
3 used in Miller Act performance bonds is set through federal
4 acquisition regulations. Under the particular facts of this case,
5 the P.O. falls within the customary meaning of "contract" found in
6 FAR 2.101, which contains an extremely broad definition of
7 contract. The complete definition of contract under these
8 regulations reads:

9 A mutually binding legal relationship obligating
10 the seller to furnish the supplies or services
11 (including construction) and the buyer to pay
12 for them. It includes all types of commitments
13 that obligate the Government to an expenditure
14 of appropriated funds and that, except as
15 otherwise authorized, are in writing. In
16 addition to bilateral instruments, contracts
include (but are not limited to) awards and
notices of awards; job orders or task letters
issued under basic ordering agreements; letter
contracts; orders, such as **purchase orders,**
under which the contract becomes effective by
written acceptance or performance; and bilateral
contract modifications.

17 48 C.F.R. § 2.101 (1990)(emphasis added).

18 The purchase order in this case became a mutually binding legal
19 relationship obligating the seller, Graybar, to furnish the
20 supplies, and the buyer, Overstreet, to pay for them. The P.O., a
21 purchase order, became an effective contract by Graybar's
22 performance--provision of specially manufactured materials and
23 equipment for installation of a station service transformer for
24 the Corps Contract.

25 Based on Overstreet's past dealings with Graybar, it was
26 customary for Graybar not to sign a purchase order but instead
27 just perform without a signature. The Court finds that the P.O.
28 is an enforceable contract between Overstreet and Graybar. The

1 Court further finds that applicable requirements of the Corps
2 Contract were expressly incorporated into the P.O., including the
3 completion date. The Court, however, finds that there is a
4 genuine issue of material fact regarding whether Graybar breached
5 the P.O. by delivering the specially manufactured goods on
6 September 5, 2003.

7 Counsel for Graybar in his post hearing submittal asks the
8 Court to certify its ruling for immediate appeal. The Court
9 concludes that an appeal at this time is likely to result in
10 piecemeal litigation with attendant delay, additional expense and
11 the elongation of the legal process. The Court respectfully
12 declines counsel's request. Accordingly,

13 **IT IS ORDERED** that:

14 1. Defendant Overstreet's Motion for Partial Summary Judgment,
15 **Ct. Rec. 99**, filed March 13, 2006 is **GRANTED in part** and **DENIED in**
16 **part**.

17 A. Summary judgment as to the existence of an
18 enforceable contract is **GRANTED**. The Court finds that on July 16,
19 2002, Defendant Overstreet and Plaintiff Graybar entered into a
20 contract titled Purchase Order No. 402-241860 for the provision of
21 certain materials and equipment for installation of a station
22 service transformer pursuant to United States Contract No. DACW67-
23 020C-0012 between Overstreet and the Corps.

24 B. Summary judgment as to whether Purchase Order No.
25 402-241860 incorporates by reference the requirements contained in
26 United States Contract No. DACW67-020C-0012 is **GRANTED in part** and
27 **DENIED in part**. The Court finds for purposes of this motion, that
28 Purchase Order No. 402-241860 incorporates by reference the

1 completion date set forth in United States Contract No. DACW67-
2 020C-0012.

3 C. Summary judgment as to whether Graybar breached the
4 Purchase Order No. 402-241860 by delivering the specially
5 manufactured goods on September 5, 2003 is **DENIED**.

6 2. Defendant Overstreet's Motion to Strike, **Ct. Rec. 126**,
7 filed April 14, 2006 is **DENIED**.

8 The District Court Executive is directed to file this Order and
9 provide copies to counsel.

10 **DATED** this 22nd day of May, 2006

11
12 ***s/Lonny R. Suko***

13

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE